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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 507

CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association, *Petitioners,*

vs.

FRANK BROTHERS FOOTWEAR, INC., a Corporation, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

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STATEMENT

The petition for certiorari in this case seeks review of a final judgment of the Supreme Court of Nebraska in *Frank Brothers Footwear, Inc.* v. *City of Omaha et al.*, 149 Neb. 888, 33 N. W. (2d) 161 (1948), reversing and remanding a judgment of the District Court in and for Douglas County, Nebraska, and directing that the Petitioners be permanently enjoined from enforcing the Omaha Itinerant Vendors' Ordinance.

FACTS OF THE CASE

The case involves the constitutionality of a municipal occupation tax of fifteen (15) dollars a day imposed, for revenue purposes, by the Omaha Municipal Code upon itinerant vendors who solicit orders for, make local displays of, or take orders for merchandise. The Ordinance also requires a permit licensing such operations and imposes certain Surety Bond and Health Certificate requirements as conditions precedent to the issuance of a permit.

The Respondent, a New York corporation, is engaged in the retail sale of footwear and allied products. Through sales representatives it displays samples of merchandise and takes orders for future delivery, subject to acceptance at its home office. It has been the practice of the Respondent for over twenty-five (25) years to solicit orders by biannual displays at hotel stands or other premises in the City of Omaha. The displays have been of two or three days' duration and have been preceded by advertising campaigns.

The Respondent brought suit against the City of Omaha and others to enjoin the enforcement of the Omaha Itinerant Vendors' Ordinance. The Lower Court denied relief, but the Supreme Court of Nebraska reversed and remanded, holding that the Ordinance in question directly and unlawfully regulated and burdened interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States.

IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED

The question of the constitutionality of the Omaha Itinerant Vendors' Ordinance is of vital importance to thousands of municipalities and other taxing authorities throughout the United States. This brief in support of the petition for certiorari herein is filed in behalf of the 520 member cities of the National Institute of Municipal Law Officers and the millions of local citizens resident therein.

Today the financial status of our municipalities and other local governmental units is critical. Rising costs, the expanding responsibilities of local government and the decline in revenues received from traditional sources have all served to highlight the problem. Increased state and Federal taxing activity has closed the doors on many possible sources of local revenue. As a result, many communities have renewed their activities in searching for methods, whereby many of those who have been receiving "free rides" at the expense of local citizens may be required to contribute their fair share of the cost of local government. Among those sought to be taxed have been itinerant vendors, solicitors and peddlers and other interstate businesses. In taxing these activities, municipalities have been confronted with the problem of requiring a reasonable exaction without transgressing the boundaries of the Commerce Clause as delineated by this Court.[1]

Equally important has been the task of regulating the activities of itinerant vendors, solicitors and peddlers for too often such activities have proved to be effective vehicles for fraud, deceit and imposition. Again municipalities

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[1] See *Municipal Regulation of Peddlers, Solicitors and Itinerant Merchants*, Report No. 118, National Institute of Municipal Law Officers, (1947), filed herewith as Exhibit A.

have been confronted with the dilemma of enforcing reasonable regulations designed to protect local citizens against such practices without transcending the limits of permissible regulation under the Commerce Clause.[2]

The recent pronouncements of this Court in defining the permissible scope of local regulation and taxation under the Commerce Clause have emphasized time after time that the validity of local legislation is not to be determined by abstract principles of constitutional law but rather by realities and practical considerations. It is manifest, however, from the opinion of the Supreme Court of Nebraska in the present case that archaic legal formulas and syllogisms rather than practical considerations were the basis of that Court's decision. It is respectfully submitted that the Supreme Court of Nebraska fell into error in reaching the result that it did; for not only does the rationale of the Nebraska decision misinterpret the purpose of the Commerce Clause, but it also misconstrues the true and proper relationship of local, state and Federal governments in the application of the Commerce Clause.

It is not to be denied that the fundamental purpose of the Commerce Clause was to create a national market unrestricted by local trade barriers. However, that purpose should not be expanded to the point where interstate commerce is actually placed in a preferred position by being given all local government services "free." The rationale of the decision of the Supreme Court of Nebraska in effect creates and grants a subsidy to those engaged in interstate traffic at the expense of local enterprise. Surely, this is more than the Commerce Clause requires. Therefore, it is respectfully submitted, in view of the circumstances of this case, that certiorari be granted to review the judgment of the Supreme Court of Nebraska.

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[2] *Ibid*, p. 124.

ARGUMENT

A Municipality May, in the Exercise of Its Police Power, Regulate the Activities of Itinerant Vendors and May Also Require Them to Contribute Their Fair Share of the Costs of Local Government. The Fact That Such Measures Affect Interstate Commerce Does Not, in and of Itself, Invalidate Them. Only if Such Regulatory and Fiscal Measures Are Hostile Toward, Discriminate Against, or Unduly Burden Interstate Commerce Will They Be Held Inconsonant with the Great Purpose of the Commerce Clause.

1. Interstate Commerce Is Not Immune from Local Taxation or Regulation

Departing from the formalism and rigid conceptualism of another day, this Court, in recent years, has consistently held that the Commerce Clause is not an absolute bar on local taxation affecting interstate commerce and that interstate commerce may be made to pay its own way. In *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, this Court said:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

This view was also acknowledged in *Nippert* v. *City of Richmond*, 327 U. S. 416, when this Court stated:

> "There is no lack of power in the state or municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field."

Again, in the concurring opinion in *Freeman* v. *Hewitt*, 329 U. S. 249, it was stated that:

> "The Commerce Clause was not designed or intended to outlaw all state taxes bearing 'directly' on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all state taxes, nor indeed all direct state taxes, can be said to produce those effects.
>
> "This Court has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both of the state of origin and the state of the market in recent years. Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin, although this may be a matter of debate."
>
> "The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the Commerce Clause."

In *Stone* v. *Interstate Gas Co.*, 103 F. (2d) 544 (CCA 5th-1939), (aff'd *per curiam*, 308 U. S. 522) the Court of Appeals in upholding a Mississippi franchise tax, stated:

> "Any immunity from general taxation appears more and more inconvenient and unjust. The recent re-examination of the basis for such immunities has resulted in upheaval. The current of authority has been turned.
>
> "A basic principle is that taxation is vital both to the State and National Governments; to be concurrently exercised by both with as little interference as possible one with the other. Another basic principle is that immunity from taxation ought to be jealously regarded.

> "An implication of immunity based on constitutional provisions ought to be a necessary implication and to extend no further than the necessity requires; and this especially when the immunity is invoked not in behalf of a government but a citizen or private corporation. It is clear also that because a matter is regulable only by one government it is not thereby exempted from just taxation by the other.
>
> "Conversely, the clause of the Federal Constitution vesting exclusive power to regulate interstate and foreign commerce in Congress ought not of itself to exempt such commerce and those who carry it on in a State from a decent and non-discriminatory State taxation."

Similarly, this Court, in endeavoring to maintain the proper balance between local and national power and interests, has often stated that the Commerce Clause does not preclude municipalities and states from exercising their police power in matters of legitimate local concern, even though they may thereby affect interstate commerce. This proposition was acknowledged in *Eichols* v. *Public Service Commission*, 306 U. S. 268, when this Court stated:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

In *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, it was said:

> "For, concurrently with the broadening scope for permissible application of federal authority, the tendency has also run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed emphasis on facts and practical considerations rather than on dogmatic logistic."

Accord: *Parker* v. *Brown*, 317 U. S. 341; *Edwards* v. *California*, 314 U. S. 160; *Carter* v. *Virginia*, 321 U. S. 131; and *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 345.

See also cases collected in the *Minnesota Rate Cases*, 230 U. S. 352, 403-411.

In view of the pronouncements of this Court cited above, it is respectfully submitted that the City of Omaha may, in the exercise of legitimate local power, tax and regulate the activities of itinerant vendors and solicitors and that such measures are not to be declared invalid merely because they may affect interstate commerce.

2. In the Absence of Congressional Action, Local Taxation and Regulation Affecting Interstate Commerce Will Only Be Declared Invalid if Such Commerce Is Discriminated Against or Unduly Burdened

It has been repeatedly held by this Court that the fundamental purpose of the Commerce Clause is to promote free intercourse between the states by protecting interstate commerce from discriminatory or destructive local action. *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*. And, as it has been stated, not all burdens upon interstate commerce, but only *undue* and *discriminatory* ones are forbidden. *Nippert* v. *City of Richmond*, *supra*. Discrimination against interstate commerce, like interstate commerce itself, is a practical conception and must involve a substanital discrimination and injury. *Greenville* v. *Query*, 286 U. S. 472.

It is respectfully submitted that the Omaha Ordinance in question does not discriminate against interstate commerce. It applies equally to itinerant vendors from Lincoln and those from New York as well as to residents of Omaha who do not have established places of business there.

Nor may it be said that the tax unduly burdens interstate commerce. The mere fact that it increases the cost of doing business does not make it an undue burden. *Coverdale* v. *Arkansas-Louisiana Pipe Line Company*, 303 U. S. 604. Vendors coming under the purview of the Ordinance receive the benefits of all the local governmental services and it cannot be said that they are unduly burdened because they must pay their fair share toward the costs of those services.

3. The Constitutionality of a Municipal Ordinance Is Not to Be Determined By Conjecture or Abstractions. A Party Seeking to Have an Act Struck Down As Inconsonant with the Commerce Clause Must Show That It Is Unconstitutional As Applied to Him

In *Southern Railway* v. *King*, 217 U. S. 524, it was said:

> "It is the settled law of this Court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operated to deprive him of rights protected by the Federal Constitution."

Accord: *Gorieb* v. *Fox*, 274 U. S. 603; and *Premier Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226.

Similarly, this Court in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, in discussing the actual factual situation before the Court, stated:

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence, a review of prior adjudications based on widely disparate facts, howsoever in general propositions, does not facilitate an answer to the present problem."

In *Best & Co.* v. *City of Omaha et al.*, 149 Neb. 868, 33 N. W. (2d) 150, which was cited by the Supreme Court of Nebraska as controlling the instant case, both opinions being handed down the same day, great reliance was placed upon *Best & Co.* v. *Maxwell*, 311 U. S. 454 and *Nippert* v. *City of Richmond, supra.* It is submitted that neither of the above decisions are controlling in the instant case.

In *Best & Co.* v. *Maxwell, supra,* the tax was laid on every person and corporation not a retail merchant in North Carolina and in practical effect discriminated against interstate commerce. Such is not the case here. The Omaha Ordinance makes no distinction between residents or nonresidents or between interstate and intrastate commerce. It applies equally to *all* itinerant vendors who do not have established places of business in the City of Omaha. It treats an itinerant vendor for a Nebraska manufacturer exactly the same as it treats itinerant vendors for manufacturers located in other states.

It is respectfully submitted that the Supreme Court of Nebraska erroneously relied upon *Nippert* v. *City of Richmond, supra.* The facts of that case and the language of the majority opinion would seem to preclude its application here. As has been previously stated, the Respondent has been carrying on the activity sought to be taxed for over twenty-five years in the City of Omaha, averaging two visits each year. Such were not the facts in the *Nippert* case. This court, in that decision stated:

> "In view of the ruling in *International Shoe Co.* v. *Washington*, 90 L. ed. (Adv. 109), 66 S. Ct. 154, *supra,* we put aside any suggestion that 'solicitation,' when conducted regularly and continuously within the state, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable.

> "We are not unmindful that large enterprise which 'does business' by sending solicitors regularly and continuously into several states, cf. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 90 L. ed. (adv. 109), 66 S. Ct. 154, *supra,* may have the financial resources and established course of business enabling it to absorb the tax and justify its doing so in the economic sense; or, that, therefore, if the ruling should extend to such a situation, the business so situated would escape to that extent bearing the burden of the tax borne by local businesses similarly situated, absent some other form of tax to equalize the burden. But, in the first place, no such case is presented by the facts here."

The record in the *Nippert* case contained nothing to show that the appellant had engaged in solicitation in Richmond at any time other than during the one five-day period there in question.

It is submitted that the Respondent here, by its past conduct, has taken itself out of that class of persons who might attack the constitutionality of the Omaha Ordinance, if in fact there be any ground for attack. The Respondent, by a regular and established course of business, has, for many years, taken advantage of the protection and other services offered by the City from local revenues. There would seem to be little doubt as to the city's jurisdiction to tax and there was no showing whatsoever by the Respondent that the tax did *in fact* unduly burden interstate commerce; the amount thereof certainly does not raise any presumption of such fact.

CONCLUSION

In view of the importance of the constitutional issue presented here to thousands of municipalities who are vitally interested in the regulation and taxation of itinerant vendors, it is respectfully submitted that the case be reviewed and re-examined by this Court. The recent decisions of this Court in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, and *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, would appear to cast considerable doubt as to correctness of the result and reasoning of the Supreme Court of Nebraska in the instant case. The fiscal needs and regulatory problems of local government are not answered by the decision of the Nebraska court. The imperative character of these problems stresses the need for this Court's determination of the issue presented.

Respectfully submitted,

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